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2  
3 UNITED STATES DISTRICT COURT

4 EASTERN DISTRICT OF WASHINGTON

5  
6 DONDA RENE PICKERING,

No. 13-cv-258-JPH

7 Plaintiff,

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

8 vs.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

12 BEFORE THE COURT are cross-motions for summary judgment. ECF No.  
13 16, 19. The parties have consented to proceed before a magistrate judge. ECF No.  
14 7. After reviewing the administrative record and the parties' briefs, the court  
grants defendant's motion for summary judgment, **ECF No. 19**.

15 **JURISDICTION**

16 Pickering applied for disability insurance benefits (DIB) and supplemental  
17 security income (SSI) benefits on May 6, 2009. She alleged onset beginning  
18 November 1, 2008 (Tr. 115, 232-34: DIB, Tr. 235-37: SSI). Benefits were denied  
initially and on reconsideration (Tr. 86-88, 90-94). ALJ Donna Shipps held the first  
hearing November 3, 2010 (Tr. 43-85) and issued an unfavorable decision on  
19 November 18, 2010 (Tr. 115-124). The Appeals Council granted review on

September 6, 2011, vacated the decision and remanded for further development and a new hearing. The ALJ had indicated Pickering could perform past work as an agricultural produce sorter, but the record did not establish this was performed at the level of substantial gainful activity (Tr. 129-31). A second hearing was held February 28, 2012 (Tr. 88-107). At this hearing Pickering amended the onset date to March 19, 2009. The ALJ incorporated by reference the testimony from the first hearing. She found Pickering's past work as a produce sorter had been performed at less than SGA levels, and corrected this error from the first decision (Tr. 89-91, 97). On March 16, 2012, ALJ Shipps issued an unfavorable decision (Tr. 21-31). The matter is now before the Court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 12, 2013. ECF No. 1, 5.

## STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decisions and the briefs of the parties. They are only briefly summarized as necessary to explain the court's decision.

Pickering was 46 years old at onset and 50 when she testified at the second hearing. She graduated from high school and worked as a certified nursing assistant (CNA) for more than nineteen years. In November 2011 she successfully passed the state CNA test. She alleges disability based on mental limitations (Tr. 29, 76, 95, 99, 263, 273, 388).

## SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of

1 such severity that a plaintiff is not only unable to do previous work but cannot,  
2 considering plaintiff's age, education and work experiences, engage in any other  
3 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
4 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
(9<sup>th</sup> Cir. 2001).

5 The Commissioner has established a five-step sequential evaluation process  
6 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
7 one determines if the person is engaged in substantial gainful activities. If so,  
benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
8 decision maker proceeds to step two, which determines whether plaintiff has a  
medically severe impairment or combination of impairments. 20 C.F.R. §§  
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe  
10 impairment or combination of impairments, the disability claim is denied.

11 If the impairment is severe, the evaluation proceeds to the third step, which  
compares plaintiff's impairment with a number of listed impairments  
12 acknowledged by the Commissioner to be so severe as to preclude substantial  
gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
§404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
13 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
not one conclusively presumed to be disabling, the evaluation proceeds to the  
14 fourth step, which determines whether the impairment prevents plaintiff from  
performing work which was performed in the past. If a plaintiff is able to perform  
15 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
16 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
(RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
17 final step in the process determines whether plaintiff is able to perform other work  
18  
19

in the national economy in view of plaintiff's residual functional capacity, age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon plaintiff to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once plaintiff establishes that a physical or mental impairment prevents the performance of previous work. The burden then shifts, at step five, to the Commissioner to show that (1) plaintiff can perform other substantial gainful activity and (2) a “significant number of jobs exist in the national economy” which plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

## **STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.

1 1965). On review, the Court considers the record as a whole, not just the evidence  
 2 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to resolve conflicts in  
 4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
 5 interpretation, the Court may not substitute its judgment for that of the  
 6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
 7 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
 8 set aside if the proper legal standards were not applied in weighing the evidence  
 9 and making the decision. *Brawner v. Secretary of Health and Human Services*,  
 10 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support  
 11 the administrative findings, or if there is conflicting evidence that will support a  
 12 finding of either disability or nondisability, the finding of the Commissioner is  
 13 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 11 ALJ'S FINDINGS

12 ALJ Shipps found Pickering was insured through December 31, 2010 (Tr.  
 13 21, 23). At step one, the ALJ found Pickering did not work at SGA levels after  
 14 onset on November 1, 2008 (Tr. 23) [The ALJ did not use the amended onset date  
 15 of March 19, 2009, Tr. 90-91, but this error appears to benefit claimant]. At steps  
 16 two and three, she found Pickering suffers from borderline intellectual functioning,  
 17 an impairment that is severe but does not meet or medically equal a listed  
 18 impairment (Tr. 23-25). The ALJ found depressive disorder is nonsevere (Tr. 23).  
 19 She found Pickering less than fully credible, able to perform a range of work at all  
 exertion levels but limited by mental impairments (Tr. 25-29). At step four, relying  
 on a vocational expert's testimony, the ALJ found Pickering is unable to perform  
 any past relevant work (Tr. 29). At step five, she found there are other jobs  
 Pickering can perform, such as small products assembler, small parts and products

1 inspector and packing line worker. The ALJ concluded Pickering was not disabled  
2 from November 1, 2008 through date of the current decision, March 16, 2012 (Tr.  
30).

3 **ISSUES**

4 Pickering alleges the ALJ rejected an examining source's opinion without  
5 giving specific and legitimate reasons. She alleges the ALJ should have found at  
6 step three that she meets Listing 12.05C. Last, she alleges the ALJ's hypothetical  
7 failed to include assessed social and intellectual limitations. ECF No. 16 at 10-18.  
The Commissioner responds that the decision is free from harmful error and based  
on substantial evidence. She asks the Court to affirm. ECF No. 19 at 4.

8 **DISCUSSION**

9 *A. Psychological limitations*

10 Pickering alleges the ALJ failed to give legitimate reasons for rejecting the  
April 2009 opinion of Mahlon Dalley, Ph.D. ECF No. 16 at 10-13, referring to Tr.  
11 331-40. The Commissioner responds that the ALJ's reasons for failing to credit the  
12 examining source's contradicted opinion are specific, legitimate and supported by  
substantial evidence. ECF No. 19 at 8-14.

13 Pickering alleges the ALJ gave four invalid reasons for rejecting Dalley's  
opinion: (1) assessed cognitive limitations are inconsistent with the ability to work  
in the past; (2) assessed social limitations are not supported by other evidence in  
the record and (3) Dalley's use of a check-box form "predicated on self-report for  
secondary gain," together with differing definitions of limitations between  
14 agencies, decrease the opinion's reliability. ECF No. 16 at 11; Tr. 123. The  
Commissioner answers that these are legitimate reasons supported by substantial  
15 evidence; further, the ALJ gave an additional valid reason for rejecting Dalley's  
opinion and not mentioned by Pickering: the opinion appears based at least in part  
16 on Pickering's less than credible self- report. Pickering does not contest the ALJ's  
opinion and packing line worker. The ALJ concluded Pickering was not disabled  
from November 1, 2008 through date of the current decision, March 16, 2012 (Tr.  
30).

1 adverse credibility finding on appeal, making it a verity. ECF No. 19 at 9, citing  
2 Tr. 27.

3       The Commissioner is correct.

4       The ALJ found Pickering less than credible for several legitimate reasons.  
5 She was dishonest with Dr. Dalley about her history of substance abuse. In April  
6 2005 she told Dr. Dalley she used methamphetamine two months earlier, in  
7 February 2005. In January 2011 she claimed she had been clean for five years. At  
8 the second hearing, in February 2012, she testified she last used drugs five or six  
years ago. In June 2011 Pickering admitted she used methamphetamine “every  
couple days.” She used in July 2011 but reported that month she had been clean for  
two years.

9       At the time of Dalley’s March 2009 evaluation, Pickering did not take  
10 psychotropic medication and was not participating in mental health treatment,  
11 despite allegations of allegedly severe anxiety and depression. At the first hearing  
12 in 2010 Pickering testified she had been taking antidepressants since September  
13 2009 and it helped her depression. In January 2011 Pickering admitted “she comes  
14 to counseling for depression because DSHS requires it.” By late 2011, on her own  
15 and without explanation, she stopped taking the medication and did not report an  
increase in depressive symptoms (Tr. 26-28, 100, 121, 315, 331-32, 354, 385, 395,  
402, 416, 430, 444, 464, 501, 504, 506, 511, 527, 541, 543, 552, 554, 557, 562).

15       These are clear and convincing reasons supported by substantial evidence  
16 for finding Pickering less than credible, and for discounting Dr. Dalley’s opinion to  
17 the extent it is based at least in part on claimant’s unreliable self-report. *Carmickle*  
18 v. Comm’r of Soc. Sec. Admin., 533 F.3d 1155, 1161 n. 2 (9<sup>th</sup> Cir. 2008) (failure to  
challenge credibility assessment in opening brief waives on appeal); *Tommasetti v.*  
19 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (inadequately or unexplained failure  
to seek treatment, and unexplained noncompliance with treatment, negatively

1 affect credibility); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir. 2005) (an  
2 opinion based on unreliable self-reporting is properly rejected).

3 Dr. Dalley assessed marked cognitive limitations, but this is inconsistent  
4 with Pickering's ability to work as a CNA for at least nineteen years, as she  
5 reported in 2005 (Tr. 28, 388, 509). It is also inconsistent with the ability to  
6 successfully pass the state CNA test in 2011. Similarly, Dalley's assessed marked  
7 social limitations are contradicted by the record. At the first hearing in 2010,  
8 Pickering testified she has a few friends, they shop for her and she socializes two  
9 to three times a week. The ALJ notes the record shows claimant has had a series of  
10 boyfriends during the relevant timeframe, further indicating less than marked  
11 social limitations (Tr. 26, 28, 81-83, 99; *see also* Tr. 253, 284, 453, 477, 492, 494,  
12 520, 522, 526, 530, 539, 550, 553, 562). *Thomas v. Barnhart*, 278 F.3d 947, 958-  
13 59 (9<sup>th</sup> Cir. 2002) (activities inconsistent with claimed limitations diminish  
14 credibility); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir. 2005) (the ALJ may  
15 properly reject any opinion that is brief, conclusory and inadequately supported by  
16 clinical findings).

17 The ALJ appropriately considered a motive for secondary gain. After  
18 Pickering tested positive for drugs in 2005, she did not work for more than three  
19 years prior to the [earliest] alleged onset date in 2008. The ALJ observes this raises  
the question whether current unemployment is truly the result of medical problems.  
Pickering told her counselor "My lawyer doesn't want me to work because of my  
SSI and my disabilities." (Tr. 26, 28, 311, 319, 332, 383, 524). An ALJ may  
certainly consider motivation and the issue of secondary gain in rejecting symptom  
testimony *Tidwell v. Apfel*, 161 F.3d 599, 602 (9<sup>th</sup> Cir. 1988). The ALJ's findings  
are upheld if supported by inferences reasonably drawn from the record. *Batson v.*  
*Commissioner of Social Security Administration*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir.  
2004).

1 Dalley's assessed marked limitations are inconsistent with mild findings on  
 2 examination, with Dalley's own conclusion Pickering did not meet the full criteria  
 3 for major depressive disorder, and with the ability to work as a CNA for at least  
 4 nineteen years even with BIF (Tr. 27, 123, 336, 339, 388).

5 The ALJ is correct. Dr. Dalley notes Pickering was oriented "times four,"  
 6 scored 29 of 30 on the Mini-Mental Status Exam, spelled world backwards and  
 7 recalled three of three items on a test for short delayed memory (Tr. 120, 332-33).  
 8 His testing in 2005 yielded similar results (Tr. 386). Dalley opined in 2009  
 9 Pickering did not meet the full criteria for major depressive disorder. Dr. Martin  
 10 testified this indicates a "fairly mild level of depression with some symptoms." (Tr.  
 11 58, 336). Any opinion that is brief, conclusory and, as here, inadequately supported  
 12 by clinical findings is properly rejected. *See Bayliss v. Barnhart*, 427 F.3d at 1216.  
 Internal inconsistencies constitute relevant evidence when the ALJ weighs medical  
 13 opinions. The ALJ is responsible for resolving conflicts in medical testimony, and  
 14 resolving ambiguity. *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d  
 15 595, 603 (9<sup>th</sup> Cir. 1999); *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995);  
 16 Magallanes, 881 F.2d 747, 751, 755 (9<sup>th</sup> Cir. 1989).

17       B. Step three

18 Pickering alleges the ALJ should have found she meets Listing 12.05C. ECF  
 19 No. 16 at 13-16. The Commissioner answers that Pickering meets only one of the  
 requirements set out in the listing. An IQ between 60 and 70 is required under the  
 first prong of the Listing. The parties agree Ms. Pickering's IQ of 65 meets the first  
 requirement. ECF No. 19 at 15-18; Tr. 24, 334.

20 The second prong requires establishing that "the individual has a physical or  
 21 other mental impairment imposing an additional and significant work-related  
 22 limitation of function." Pickering alleges she suffers depression and this meets the  
 23 second prong of the two-pronged test for Listing 12.05C.

1 It is a claimant's burden to show a Listing is met. *Tackett v. Apfel*, 180 F. 3d  
2 1094, 1098-1099 (9<sup>th</sup> Cir. 1999). Pickering fails to meet this burden because she  
3 does not meet the second prong.

4 At the first hearing in 2010, Marian Martin, Ph.D., testified Pickering did not  
5 meet the second prong of the test (Tr. 53-55). In addition to Dr. Martin's opinion,  
6 the ALJ relied on Pickering's ability to work as a certified nurse's assistant for at  
7 least nineteen years, even with borderline intellectual functioning. The ALJ relied  
8 on claimant's unexplained failure to maintain medication compliance and  
9 treatment for allegedly severe depression. The ALJ notes treatment of depression  
10 with medication has been successful in the past. The ALJ found Pickering less than  
11 fully credible (Tr. 49, 59, 61-62, 67-68, 21-23).

12 The evidence shows activities incompatible with the severity of claimed  
13 limitations, including (as noted) the ability to work for many years even with BIF.  
14 The ALJ observes Pickering was not fired from her jobs as a CNA due to mental  
15 limitations from BIF or depression; she was fired because urinalysis showed drug  
16 use. The ALJ notes depression has at times been situational, such as after  
17 Pickering's adult children moved out and during her mother's illness. In November  
18 2011 Pickering passed the state CNA test, further indication that despite BIF she  
19 does not have "a physical or other mental impairment imposing an additional and  
significant limitation of function," as required to meet this Listing (Tr. 27, 95, 97-  
100, 331, 385). Significantly, in 2005 Dr. Dalley notes Pickering's presenting  
problem is vocational distress, but it "has had no significant effect on [her] work  
performance, personal relationships, or health. Other concurrent problems include  
depression and drug abuse." He observes Pickering does not appear to exhibit  
significant deficits in her adaptive functioning (Tr. 383, 388).

20 The record does not support a different step three finding. Pickering fails to  
21 point to any evidence showing greater limitations than those assessed by the ALJ.

1 The litany of individual record references at ECF No. 16 at 15-16 reflects  
2 Pickering's own discredited alleged symptoms and isolated record references to  
3 depression and anxiety that fall far short of establishing her impairments meet  
4 Listing 12.05C.

5 *C. Step five*

6 Last, Pickering alleges the ALJ's hypothetical was improper because it  
7 failed to include limitations assessed by a reviewing doctor in 2009. ECF No. 16 at  
8 16-18, referring to Tr. 367, 379. The Commissioner responds that the ALJ's step  
9 five analysis was proper. ECF No. 19 at 18-20.

10 An ALJ's hypothetical must only include those limitations supported by  
11 substantial evidence. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 886 (9<sup>th</sup> Cir.  
12 2006). The ALJ properly weighed the evidence. Her hypothetical included the  
13 limitations supported by substantial evidence. There was no error at step five.

14 **CONCLUSION**

15 After review the Court finds the ALJ's decision is supported by substantial  
16 evidence and free of legal error.

17 **IT IS ORDERED:**

18 1. Defendant's motion for summary judgment, **ECF No. 19**, is **granted**.  
19 2. Plaintiff's motion for summary judgment, ECF No. 16, is denied.

The District Executive is directed to file this Order, provide copies to  
counsel, enter judgment in favor of defendant, and **CLOSE** the file.

DATED this 13th day of June, 2014.

s/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE